

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ESTHER REBECCA NAJER,

Defendant-Appellant.

UNPUBLISHED

May 12, 2011

No. 296322

Washtenaw Circuit Court

LC No. 09-000474-FH

Before: DONOFRIO, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

Defendant, Esther Rebecca Najer, appeals as of right her bench trial convictions of three counts of larceny in a building, MCL 750.360. Although defendant suffered from ineffective assistance of counsel with regard to the admission of her medical records at trial, When considering the overwhelming eyewitness evidence that defendant committed the crime of larceny in a building at least three times, defendant has not overcome the heavy burden of demonstrating the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, and, we affirm.

I

Janette Birton and Raymond Dobbins are the parents of Lucretia Dobbins. Lucretia suffered from spinal meningitis at the age of three months old. The illness left her blind, unable to walk or talk, she had to be gastronomy tube fed, and she suffered from frequent seizures. In September 2008, Lucretia was 26 years old and increasingly ill because she had contracted pneumonia. When Lucretia suffered from labored breathing, Birton called the paramedics who rushed her to University of Michigan Hospital where she was placed on a respirator. After a week on the ventilator at the hospital, Lucretia's health was not progressing and her parents made the decision to take Lucretia off the ventilator and make her comfortable. Lucretia was in the ICU on September 6, 2008 when Birton and Dobbins informed hospital staff that they had made the decision to switch Lucretia to comfort care medications. At that point, hospital staff hung morphine for Lucretia.

On that day, as was typical to Birton and Dobbins, a nurse came in and introduced herself to them and identified herself as Lucretia's care nurse for that day. Later that day, another nurse, defendant, who was not Lucretia's care nurse, came into Lucretia's room. According to Birton, defendant entered the room, did not identify herself, approached Lucretia's IV port, took out a

syringe, withdrew approximately 5 cc's from the morphine port, stuck the syringe into her left pocket, and then left the room. Dobbins also saw defendant walk into Lucretia's room, take liquid out of the morphine bag, put the syringe in her pocket, and leave the room. Birton stated that at the time defendant entered the room and withdrew the morphine, there was nothing wrong with Lucretia's IV and no alarms were sounding or beeping on the machine. Burton testified that when defendant left the room, she "said to myself well, she didn't put it in the trash, and she didn't put it in the sink, she didn't go to the Sharps container, so I told her father. I said Raymond, I think that nurse stole Lucretia's medicine." Birton testified that she was approximately four feet away from defendant when she was at the IV pole because it was on one side of the bed and Birton was sitting on the other side of the bed right next to Lucretia. Dobbins was also in the room during the incident sitting beside Birton.

Birton testified that less than one hour later defendant returned to the room, went directly to the IV pole, withdrew more morphine from the same port with a syringe, stuck it into her pocket, and then left the room. Again, there were no issues with the IV pole or intravenous machine the second time defendant returned to the room. According to Birton, she and Dobbins were both still sitting there when it occurred again. She stated that they had a conversation about their observations and then Dobbins left the room to tell Lucretia's care nurse what happened. Dobbins testified that he went to the nurses' station and explained what happened. According to Birton, the charge nurse came into Lucretia's room and asked them about the incident and said that "they were watching [defendant]."

Later in the day Birton and Dobbins took a short break and went outside. At that time Birton's sister, Janice Jones stayed in Lucretia's room. Jones testified that while Birton and Dobbins left the room, she saw defendant come into Lucretia's room, take something out of her pocket, draw fluid out of Lucretia's IV, put it back into her pocket, and walk out of the room. Jones testified that she saw defendant come into the room a second time and do the same thing one more time before Lucretia passed away. Jones stated that she visited Lucretia regularly at the hospital and defendant was not the nurse that introduced herself as responsible for Lucretia's care.

Lucretia passed away at approximately 6:15 pm on September 6, 2008. Dobbins testified that he saw defendant enter the room after Lucretia passed away, went to the bag, put a needle in it, pulled some liquid out, put it in her pocket, and left the room. Dobbins was in shock at the time from his daughter's death and does not recall from what IV bag defendant withdrew the liquid. Dobbins recalled reporting his observations that defendant entered Lucretia's room and withdrew liquids from her IV three times to someone he believed to be the head nurse.

Both Birton and Dobbins admitted that during the eight days Lucretia was in the hospital, nurses other than Lucretia's assigned care nurse would enter the room and assist in Lucretia's care.

Julie Anne Faught (nee Hutchinson) is a registered nurse and had been employed at U of M Hospital for six years as of September 2008. Faught was assigned to Lucretia on September 6, 2008 and her shift was from 7:00 am to 7:30 pm. Faught introduced herself to Lucretia's family and informed them that she was Lucretia's nurse for the day. On that day, a physician informed Faught that Lucretia had been changed to comfort care for medication purposes

meaning that hospital personnel was no longer going to hinder an active dying process and instead were only going to take measures to increase comfort. This meant no more labs and tests, and no more antibiotics, measuring of vital signs, blood pressure, or heart rate. On that day, records showed that during comfort care Lucretia was on three different IV medications, saline, morphine, and midazolam which is Versed.

In accordance with a physician order, for purposes of pain relief and ease of breathing, Faught retrieved a 100 ml bag of morphine from an Omnicell locked medicine dispenser at 10:07 am. Faught then hung the morphine, primed the IV line resulting in a waste of about 1 cc, and began the infusion process for Lucretia. Faught stated that the first bag of morphine went dry so she hung a second bag of morphine for Lucretia at 5:01 pm. She did not need to re-prime the lines because only the bag went dry, not the lines. She did admit however, that it is not unusual for a nurse to take a syringe and draw air out of a line if a line went dry and there is air in the line. Faught stated that she did not hear any alarms or beeping coming from Faught's room that day, and only one nurse reported that she had responded to an alarm in Faught's absence, June Durr-Brown.¹ Faught did not ask defendant to assist her with Lucretia at any time that day.

Faught testified that when she learned of Lucretia's family's concerns about defendant's activities in the room she first went and checked the morphine pump and then she immediately took the concerns to the charge nurse, Denyse Guth. Faught was working right outside Lucretia's room and she saw defendant walk out of the room. Faught went into Lucretia's room right after she passed away but before she was officially declared deceased and noticed that Lucretia's morphine pump was turned off but none of the other pumps were turned off. Faught testified that she did not turn the pump off and that pumps are not supposed to be turned off until the patient is officially pronounced dead by a physician. When Lucretia was pronounced deceased at 6:22 pm, Faught was present and turned off the rest of the machinery. According to Faught, because morphine is a narcotic, any remaining fluid must be "wasted" back in the Omnicell and this occurred at 6:28 pm. The total amount wasted from the second bag was 100 cc's meaning that Lucretia received only 18 cc's from the bag which Faught testified was due to overfill in the bag that had not been primed.

Denyse Guth testified that she was the charge nurse in the ICU on September 6, 2008. On that date she received information that Lucretia's family had concerns that defendant was stealing morphine from their daughter. Guth assured the family that she would look into it and then she called the nurse manager, Maryann Adamczyk. Guth did not speak to defendant about the situation, but did interact with defendant on other matters that day and believed that defendant was taking care of her patients appropriately that day. Guth witnessed Faught document the waste of the remaining 100 cc's of morphine from the second bag Faught hung.

¹ June Durr-Brown testified that she responded to an alarm on Lucretia's IV machine on September 2, 2008 and all she had to do was "just kind of play around with the tubing" and hit the reset button. She did not need to use a syringe to draw air out of a line that day, although she testified that she has occasionally in the past.

She stated that the morphine was a premixed bag from the manufacturer and typically can contain an overfill of 10 to 20 cc's.

Maryann Adamczyk is the nurse manager of the critical care unit and defendant was under her supervision. On September 6, 2008, Adamczyk received a phone call at home at approximately 5:30 pm from Guth informing her that Lucretia's family was concerned that defendant was entering the room and taking morphine from the line. Adamczyk came into the hospital to investigate what was going on. It took her about 30 minutes to get to the hospital after receiving the phone call. Adamczyk spoke with Guth, Faught, Dobbins, and Jones. She did not speak with Birton because Birton was too distraught at the time.

As part of her investigation, she sent the actual pump used to dispense Lucretia's morphine to the bio-med department to make sure it was functioning correctly. She later received a report that the pump was accurately functioning and providing the amount of fluid it was supposed to provide.² Adamczyk also spoke with the clinicians involved with Lucretia's care, including Faught and Guth. She attempted to investigate any missing morphine by looking at flow sheets to see when the drip was hung and checking "Care Link" documentation. Based on the information she reviewed, after performing her calculations, Adamczyk determined that there was at least 22 cc's of morphine missing from the first bag of morphine. Adamczyk testified that there could be more morphine missing because the bags are typically overfilled with an additive that varies from 10 to 20 cc's per 100 cc bag depending on the pharmacy. Adamczyk explained her calculation that there was at least 22 cc's of morphine missing from the first bag of morphine as follows:

I asked the clinicians, because when you first hang an IV fluid line, the tubing is empty so you have to what we call purge or prime the line and there's a certain amount of fluid or cc's from the bag that does that.

And they -- I asked the clinician to; (a), measure it for me and they did that. It was approximately 20 cc's to purge the line that was used. And I asked if -- when she was purging, did she accidentally or think that she over-purged, let fluid come out, and she said no, I was very careful, it's a morphine drip, and I made sure that, you know, you don't waste a narcotic like that or any other drug.

² Ronald McCarty is employed at the U of M Medical Center in biomedical engineering and he testified that he performed a variety of accuracy tests on Lucretia's IV pump. He testified that based on his testing, the pump was accurately working. In his testing he allowed for a margin of error of plus or minus 5% on that particular pump.

I added [the 20 cc amount used to prime the line] to the amount that -- of volume that was in the bag to determine -- on the flow sheet. Add that to how much was documented as infused, added the prime amount, and came up with an amount that should have been infused when the bag was hung to when the next bag needed to be hung.

She testified that she checked her calculations “many, many” times, at least 5 to 10 times and came up with the same number over and over again. Adamczyk also testified that the protocol in the department was for the care nurse to shut off the pumps only after the patient is pronounced dead.

Adamczyk spoke with defendant that day and did not notice any signs of narcotic intoxication and she did not seem to be impaired in any way. Adamczyk did not search defendant and did not ask her to empty her pockets. She did not ask defendant to take a drug test on September 6, 2008 because she did not appear impaired. Adamczyk did not search defendant’s locker that day, but did later and did not find any morphine. Adamczyk allowed defendant to stay on the floor caring for patients because she did not seem impaired in any way and so she felt comfortable waiting until she completed a full investigation into the matter before talking with defendant about the allegations. Adamczyk testified that defendant had received a very good evaluation and that she received very good feedback from staff, families, and patients.

Christopher Title is the clinical nurse supervisor at University of Michigan Health System. Title hired defendant as a registered nurse in January 2003. Title believed that defendant had approximately 20 years experience as a registered nurse. Title testified that in November 2007, he received a report that defendant had passed out and become unresponsive while in her unit and had to be taken to the emergency room.

On May 14, 2008, Title received a report from the charge nurse that there was something wrong with defendant. Title went to check on defendant. She was sitting in a chair next to a patient’s bed and did not look well. Title asked her how she was feeling and she said she was doing okay. Title asked defendant if she knew where she was and she said that she was sitting at home. This occurred during defendant’s work shift when she was supposed to be caring for patients and Title was concerned so he decided that she needed to go to the emergency room. Title asked her if she wanted to go to the ER and she agreed. Defendant was amicable to whatever Title said. Though Title suggested a wheelchair defendant said she could walk and they started on their way to the ER. Title asked defendant if she had taken too much allergy medication. They stopped in the back room where employees keep their bags and defendant got her bag out. Defendant poured out a number of pills, some blue and some white out of a bottle into her hand and started to take all of the pills. Title stopped her from taking the pills and continued to walk her down to the ER. Title asked for help from Phil Lenert, a hospital educator, in walking defendant down to the ER because defendant appeared to be somewhat intoxicated. She was unable to walk a straight line, kept bumping into walls, and was walking very slowly and stumbling. Title and Lenert left defendant at the ER. ER staff later went and retrieved her bag and its contents. Defendant was off work for approximately six weeks after the incident. Title did not believe that he could request that a fitness for duty evaluation be done on defendant because he had already taken her off the floor and she was not caring for patients.

After the incident giving rise to this case, on September 25, 2008, Title was present at a Disciplinary Review Committee (DRC) meeting where defendant and others were present. Title believed defendant could have been intoxicated or under the effects of medication that day because she “didn’t seem quite right.” At the meeting, Title did not ask defendant to take a drug test but did ask her if she had “anything to tell us.” Title testified that he checked the Omnicell records and determined that there were no missing drugs or shortages tied specifically to defendant except for September 6, 2008. Title testified that the Omnicell report showed that also on September 6, 2008, defendant had taken out a bag of morphine for someone else’s patient and that the entire 100 cc bag of morphine was never accounted for that day. The bag of morphine was never located. The patient passed away and the room was cleaned and the morphine bag was not in the room. Title testified that they did not know there was a missing bag of narcotics on that day, they only later determined it was missing when they did the investigation.

Title believed that defendant’s behavior on May 14, 2008 and on September 25, 2008 was consistent with a person under the influence of alcohol or narcotics. Title’s opinion was that 22 cc’s of morphine was a significant amount of morphine considering the fact morphine is an opiate and that 10 cc’s of morphine in one dose could slow a respiratory rate to a point that could cause death. Title testified that the bags of morphine used in the unit start with 100 cc’s of D5 or sugar water and then the morphine itself is infused into the bag by either a manufacturer or a pharmacy. The volume of the morphine itself added to the sugar water creates the overfill in the bag.

The prosecutor moved for the admission of certified medical records from defendant’s stay at St. Joseph Hospital beginning on May 16, 2008, two days after Title found her intoxicated on the hospital floor during work hours. The trial court asked the defense if it had any objections. The defense did not object to the admission of the records. The trial court admitted the records.³ The prosecutor highlighted several points on the record with regard to the contents of the psychological and medical records.

At trial, Kathleen O’Brien D’Andrea testified on behalf of the defense. D’Andrea has a 33 year history working in various positions in nursing. She is currently employed in cardiology research at University of Michigan Health System. D’Andrea testified that she looked at Lucretia’s medical flow chart written by Faught with regard to the morphine administered as well as a computer generated Medical Administration Record for Lucretia and she could not account for 22 cc’s of missing morphine based on the total volume of morphine administered. D’Andrea testified that if there was a discrepancy it could be accounted for in priming the lines

³ The chronology of how the records came into the prosecutor’s possession is included below in the analysis section in detail. The actual medical and psychological records are not part of the lower court record and as such this Court does not have the ability to and has not reviewed the contents of those records.

which in her opinion takes generally between 27 and 37 cc's of fluid leaving a total missing amount of morphine of only 5 cc's at most. It was D'Andrea's conclusion that no morphine was missing based on her review of the record and that any other calculations were incorrect.

On cross-examination D'Andrea admitted that she is being compensated for her review of the record in this case at \$150 per hour and being paid \$250 per hour for her testimony totaling approximately \$7,000 for her testimony. D'Andrea also admitted that she has never worked in the ICU, though she does have critical care experience on survival flights. D'Andrea testified that she performed her calculations with the assumption that the bag of morphine used did not contain any overflow and contained exactly 100 cc's.

The trial court found defendant guilty of three counts of larceny in a building stating as follows:

THE COURT. The Court found that on September 6th, 2008, Ms. Birton testified that while she was very familiar with the nurse who had been assigned to her daughter's care for that day was surprised to see the defendant enter the room. She had never seen her before, and go over to the port on the IV stand and draw off some, approximately what looked like about five cc's of fluid in the syringe and put that in her pocket, not throw it away into a Sharps bin or anything else, but just put it into her pocket, walk out.

She testified that about an hour later that day, defendant came in and did it again, same thing. She testified that. I believe that she and Mr. Dobbins left the room to go find the nurse in charge and her sister stayed in the room.

Ms. Birton said that she did tell the charge nurse what had happened and Mr. – Mr. Dobbins testified that while in the room, he saw the defendant do the same thing. Walk up, put a syringe in, withdraw some fluids, put it in the – took it from the smaller bag which he believed was the morphine bag, put it in her pocket, and left. He told the nurse's station about this.

The defendant came in again and he saw this happen while after his – after his daughter had passed away. Ms. Jones, Janice Jones testified that she was very close to the IV pole, within I think it appeared to me about four feet, and the defendant came in. She observed the defendant come in and withdraw this IV fluid, put it in her pocket and leave. One time that was when she was alone in the room. Another time was when Mr. Dobbins was present.

None of the witnesses testified to hearing any beeping or seeing any irregularity or being aware of any irregularity in the IV pole that would require a nurse to come in and do something with it.

Nurse Faught testified that she was the main nurse assigned to the care of the patient. When she was told by Mr. Dobbins of what had happened, she told the charge nurse. She testified that she had found the morphine pump had been turned off prior to Lucretia having passed away. She testified this was – was completely not normal. She said she would never turn off an alarm. An alarm

would never turn off while it – it would never either be – couldn't be turned off – strike that.

I think what she said was while it was infusing, you can't turn off an alarm. You can only turn it off after it sounds. You can make it silence. I guess you can turn the whole thing, a pump off but as long as it's pump – as long as it's on, the alarm would – would sound.

She testified that these bags are routinely overfilled and that it was not unusual that at the flow rate that it was called for in this case, that she could still – you could still have a hundred cc's left after an hour to an hour and-a-half's worth.

Ms. Durr-Brown testified that she responded to an IV alarm in Lucretia's room. She just rearranged the time and hit the reset button and it stopped. She didn't use a syringe, didn't need to use a syringe.

Nurse Guth testified she was the charge nurse. She spoke with the family. She also testified of the typical overfill of ten to 20 cc's. Nurse Adamczyk testified that she was the nurse manager of the critical care unit. She was called by the charge nurse. She came in, did examine the records, and concluded after having done the computations five to ten times that there was at least 22 cc's of morphine missing. That the nurse flow sheets are the accurate reflection of the administration rate and not the MAR, and that using those flow sheet rates and even accounting for the possibility of the overflow, that at the very minimum, at least 22 cc's was missing.

Mr. McCarty is a – in the medical biomechanics field. He tested the IV pump and determined that it was working accurately within the tolerances of plus or minus five percent.

Mr. Title, the clinical nurse supervisor, again confirmed that the alarm cannot be shut off. Said it was the policy of the hospital to throw uncapped needles in the Sharps bin. It was easy to do this.

He talked about what happened on May 14th previously in the year when he knew the defendant. He had worked with her for mostly the – much of the time that he had worked at the hospital, at least for a year and-a-half, and he had been made aware of the fact that she had apparently fainted or passed out and when he responded to her, she appeared to be, quote, "out of it".

He thought she seemed to exhibit signs that would mimic intoxication or drug influence. He asked her if she even knew where she was and she said oh, yes, I'm at home, when she was in fact at the hospital. He asked her about what she had taken, had she taken some pills, had she overdosed on her medications for I think allergies. And when asked what did she take and she pulled out a vial of pills and dumped a bunch out and appeared to him like she was going to take the pills and he stopped her from doing that.

On the 25th of September, there was a discipline review meeting and she still appeared not to be quite right.

Exhibit 4. the People admitted which is the records showing the uncontroverted admission and treatment records concerning the defendant which uncontroverted documents positive tests for opiates and self-reported statements of some – to some degree of some drug – whether dependency or at least abuse in the sense of taking pain medications from Canada in excessive amounts.

The defense basically relies on the testimony of Nurse D'Andrea who reviewed the records and in her opinion said that she can't come up with anything that would account – that would substantiate fluid being missing and she was paid about \$7,000.00 for her testimony. That she admitted on cross-examination that her calculations didn't account for overflow as he wasn't aware that the bags were overfilled and that's contrary to all the testimony which -- that the bags are overfilled.

The defense questioned how it could be that you could have overfill in bags and have the administration rate be accurate, but there was testimony from Mr. Title that the bags – the premixed bags or the bags from the pharmacy that are mixed by the pharmacy that have the overfill amount are still diluted in the right consistency or formula so that it would not result in any sort of error in administration.

The expert witness for the defense testified that she believes the inconsistency in the flow rate between the MAR and the nursing flow chart rates would account for the missing fluids, if any in fact were missing. Mr. Title retook the witness stand and again testified to addition of the morphine to the bags and the overfill and the ratio formulas that are marked on the bags.

The evidence is uncontroverted that the defendant did walk into the room, did place a syringe in the – in the port, and did withdraw what appeared to be fluids from the port and there is no evidence that would contradict that. I found no reason to disbelieve the family of the patient who, as the prosecutor did point out, were probably more savvy than the average family members because unfortunately for them, they spent a lifetime dealing with a child who had serious health issues which brought her to the hospital on numerous occasions and had prior administrations and therefore familiar with the processes that go on.

I don't know why they would make up the fact that a nurse walked in and withdrew fluids from an IV bag unless that's what happened.

So we have evidence, the Court is convinced beyond a reasonable doubt that that occurred. What was it? Well, the defense makes much of the fact that – argues that the People's witnesses computations aren't accurate and there could be other things that accounted for the, in that witness' opinion, miscalculation of the 22 cc's but nevertheless, that doesn't change the fact that again, the evidence

is uncontroverted that eyewitness testimony, not circumstantial evidence, not calculations, but that eyewitness testimony saw a withdrawal of fluids from the hospital's IV bags.

The explanation by the People I think is – is a convincing explanation, and it was the – not just the prosecutor's explanation. It was the testimony from one of the witnesses. I've forgotten which, but as the prosecutor refreshed my memory, that the accurate reflection of the flow rate is the nursing flow sheets which are Exhibits 2 and 3, not the MAR which is more – more accurately reflects simply the time that the bags were hung and the number of bags that were hung and not the flow rate which the nurses are – it's their responsibility to chart that and they did that.

And that's the – that's the documentation upon which Ms. Adamczyk used when she made the calculations which she checked repeatedly.

The only question that I have – so therefore, I find beyond a reasonable doubt that the defendant is guilty of larceny in a building having stolen this – these fluids and the People are correct. I mean it doesn't necessarily have to be morphine, but more than – beyond a reasonable doubt, the Court finds that it was, in fact, morphine.

But even if she stole saline solution, that would still be sufficient to be guilty of larceny in a building. There is the circumstantial evidence which while again not by itself necessarily would prove guilt beyond a reasonable doubt, but it certainly does – is consistent with the evidence. And that circumstantial evidence being that the defendant appears to have a – appears to have had in 2008 in May and probably again in September, a – at least an affinity for and a liking to the use of controlled substances and drugs, and more than likely resulted in some sort of a drug reaction or overdose, and it – and again, I mean there's nothing to controvert that she tested positive for those substances and I think there was evidence in those records that she self-reported going to Canada to get – to get some of these – some of these – these controlled substances and had become somewhat dependent upon pain medications at the very least.

So the only question that I have is have the People proven beyond a reasonable doubt four separate counts. I think that's a little sketchy. Maybe I just missed something but I can't say beyond a reasonable doubt that I – that I can account for four separate occasions. I can account for three because we know that Ms. – the sister, Ms. Jones, testified and it's uncontroverted that she saw it happen once when no one else was in the room, and the other two witnesses have testified to have seen it two additional times.

And accordingly, I find the defendant guilty of larceny in a building, three counts.

On January 7, 2010, the trial court sentenced defendant to two years' probation.

Defendant filed a motion for new trial or alternatively for an evidentiary hearing based on alleged ineffective assistance of counsel at trial and the trial court heard the motion on August 26, 2010. Defendant argued that her counsel was ineffective because counsel failed to challenge a search warrant allowing the seizure of her psychological records and failed to object to the admission of those privileged records at trial. The prosecutor responded that based on the eyewitness evidence admitted at trial, the trial court would have convicted defendant of larceny in a building without the admission of the psychological records. The trial court agreed with the prosecutor stating:

All right, the Court has reviewed the briefs, listened carefully to your arguments. And the Court will deny the motion for the reasons stated by the People. The Court does not believe that the defendant has met the high bar that is required to support a claim of inefficient--ineffective assistance of counsel.

There was compelling eyewitness testimony in this case, which I recall--that very well--that testimony. The only thing I could not recall is I could not recall whether the defendant testified; my sense was that she did not. But--so the allegations with regard to this eyewitness testimony were uncontroverted.

The Court believes that this would not have in any way changed the outcome, even if the disputed evidence with regard to the--medical records had not been offered.

The Court also finds, as the People have argued, that the defendant has not shown that her actions--that the actions of her trial counsel rose to the level of constitutional ineffectiveness, nor has she established actual prejudice resulting from the alleged ineffectiveness of counsel.

The Court believes there is trial strategy to justify trial counsel's decisions. The Court does not believe that a *Ginther*⁴ hearing is required or indicated. Accordingly, the motion is denied.

Defendant now appeals as of right.

II

On appeal, defendant argues that she was denied her right to the effective assistance of counsel: when her counsel failed to challenge a search warrant allowing the seizure of her psychological records, failed to object to the admission of those privileged records at trial, and failed to object to the introduction of other acts evidence because it was inadmissible pursuant to both MRE 403 and MRE 404(b).

⁴ *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Defendant raises a claim of ineffective assistance of counsel that defendant preserved for review by moving for a new trial or evidentiary hearing; however, because the trial court denied defendant's motion, our review is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). When reviewing claims of ineffective assistance of counsel we review the trial court's factual findings for clear error and its constitutional determinations are reviewed de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc*, 465 Mich at 578. Generally, to establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). In other words, in order to demonstrate that she was denied the effective assistance of counsel under either the federal or state constitutions, a defendant must first show that trial counsel's performance was "deficient," and second, a defendant must show that the "deficient performance prejudiced the defense." *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different." *Id.* at 600.

A

Defendant first asserts that she was denied her right to the effective assistance of counsel when her counsel failed to challenge a search warrant allowing the seizure of her psychological records and failed to object to the admission of those privileged records at trial. "This Court reviews de novo a trial court's ultimate decision on a motion to suppress evidence." *People v Akins*, 259 Mich App 545, 563-564; 675 NW2d 863 (2003). Though this Court reviews the entire record de novo, a trial court's factual findings are reviewed for clear error. *People v Daoud*, 462 Mich 621, 629; 614 NW2d 152 (2000). "The trial court's factual findings are clearly erroneous if, after review of the record, this Court is left with a definite and firm conviction that a mistake has been made." *People v Givans*, 227 Mich App 113, 119; 575 NW2d 84 (1997).

In order to analyze this issue, we must first understand the chronology of how these medical and psychological records came into the prosecutor's possession. On September 4, 2009, a police sergeant with the University of Michigan Department of Public Safety (the name on the affidavit is not readable) averred that he had spoken with the eyewitnesses in this case and was familiar with the case. He also averred that the prosecutor had informed him that defendant had checked herself into St. Joseph Hospital for psychological treatment at certain times and that he had attempted to retrieve the records using a subpoena. He stated that St. Joseph Hospital would not release the records without an order signed by a judge.

Based on the affidavit, Judge Elizabeth Hines signed a search warrant to be served at St. Joseph Hospital for the following: "Medical records, including psychological medical records, of Esther Rebecca Najer, born, 3/9/1961, . . . for the period of Jan. 1, 2008 through Dec. 31, 2008."

The search occurred on September 8, 2009 and the following property was taken, “Medical Records for Esther Najer as provided by St. Joseph Hospital.”

On September 10, 2009, the prosecutor filed a “Notice of the People’s Intent to Offer Records of Regularly [sic] Conducted [sic] Activity into Evidence.” The notice stated that the “People intend on offering records of regularly conducted activity into evidence pursuant to MRE 902(11). The records are admissible under MRE 803(6). The records consist of the Defendant’s medical records from St. Joseph Hospital. The defense has been provided with a copy of the medical records. If and when the People receive additional records, the People will promptly provide defense counsel with copies of those records.”

On October 14, 2009, defendant filed an “Emergency Motion to Quash Medical Records.” Defendant provided the following basis for quashing the medical records in their entirety:

1. Defendant is charged with four (4) counts of larceny from a building in violation of MCL 750.360.
2. The People intend to admit properly obtained psychiatric records pursuant to MRE 803(6).
3. The psychiatric records are replete with opinions and diagnoses from health care providers including mental health providers and are beyond the scope of MRE 803(6).
4. Opinions and diagnosis are not included in the business records exception to exclusion of hearsay. MRE 803(6); *People v Shipp*, 175 Mich App 332; 437 NW2d 385 (1989).

On October 21, 2009, the prosecutor filed its response motion arguing that the records were admissible at trial pursuant to the business records exception to the hearsay rule, MRE 803(6) and that the documents are self-authenticating and have been properly certified under MRE 902(11). The prosecutor stated that defendant’s reliance on *Shipp* was misplaced because MRE 803(6) was amended March 1, 1991 post-*Shipp*. The prosecutor states that the records at issue are not excluded by the hearsay rule and in fact are specifically allowable under MRE 803(6).

The trial court heard the motion on October 22, 2009. Defendant argued that the medical records should not be admitted under MRE 803(6) because (1) they were replete with inconsistencies and differing diagnoses, and therefore, not particularly reliable, (2) there is an indicia of a “cut and paste” approach to the records that call into question their reliability, and (3) the conclusions contained in the records are wildly inconsistent, and (4) while they may have some relevance they are highly prejudicial because of the inconsistencies. The prosecutor responded that the records are authenticated under MRE 902(11) and MRE 803(6) allows for the records to be admitted. The trial court admitted the records finding that “[t]he objections the defense counsel cites, the Court believes go to the weight of the evidence, not its admissibility. In most criminal cases, almost all the evidence the People present is going to be prejudicial to some degree. It’s not so prejudicial as to be unfair.” The trial court continued that “The Court

rule itself sets forth what will be admissible and what are not excluded by the hearsay rule and as quoted in the brief, it's -- it says, 'a memorandum, report, record or data compilation in any form of acts, transactions, occurrences, events, conditions, opinions or diagnoses made at or near the time,' et cetera, et cetera." And the Court concluded, "So that while there may be things in the document that might not be admissible, at least those things are going to be admissible. So I can rule on it at the time specifically, but I -- as a general ruling the -- the opinion and diagnoses that are contained in those, what the people are seeking to focus on, those will be admissible."

For the first time on appeal, defendant now contends that that the medical records at issue were inadmissible because they were privileged documents not subject to disclosure nor admission at trial, and that the search warrant was invalid because psychological records are not an appropriate subject of a search warrant.

MCLA 333.18237 protects communications with psychologists that are "necessary to enable the psychologist to render services." MCL 333.18237 provides as follows:

A psychologist licensed or allowed to use that title under this part or an individual under his or her supervision cannot be compelled to disclose confidential information acquired from an individual consulting the psychologist in his or her professional capacity if the information is necessary to enable the psychologist to render services. Information may be disclosed with the consent of the individual consulting the psychologist, or if the individual consulting the psychologist is a minor, with the consent of the minor's guardian, pursuant to section 16222 [MCL 333.16222.] if the psychologist reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. [MCL 333.16281.] In a contest on the admission of a deceased individual's will to probate, an heir at law of the decedent, whether a proponent or contestant of the will, and the personal representative of the decedent may waive the privilege created by this section.

"The purpose of the privilege statute is to protect the confidential nature of the psychologist-patient relationship." *People v Lobaito*, 133 Mich App 547, 562; 351 NW2d 233 (1984). To qualify for protection, the information in question must have been imparted for the purpose of seeking or providing medical advice or treatment. *Schechet v Kesten*, 372 Mich 346, 351; 126 NW2d 718 (1964). In addition, the admissibility of privileged communications is governed by MCL 330.1750, which prohibits the disclosure of "privileged communications" in a criminal case unless the patient has waived the privilege or an exception applies. MCL 333.1750(1). The prosecutor has not alleged that an exception enumerated in MCL 330.1750(2) applies in this case.

"When a mental or physical condition of a party is in controversy, medical information about the condition is subject to discovery under [MCR 2.310] to the extent that . . . the party does not assert that the information is subject to a valid privilege." MCR 2.314(A)(1)(b). When a party receives a request for medical information under MCR 2.310, they must either:

- (a) make the information available for inspection and copying as requested;

- (b) assert that the information is privileged;
- (c) object to the request as permitted by MCR 2.310(C)(2); or
- (d) furnish the requesting party with signed authorizations in the form approved by the state court administrator sufficient in number to enable the requesting party to obtain the information requested from persons, institutions, hospitals, and other custodians in actual possession of the information requested. [MCR 2.314(C)(1).]

Further, MCR 2.314(B)(1) states that a party who possesses a valid privilege that would defeat the discovery of medical information concerning that party's physical or mental condition must raise that privilege in a written response to a request for production of documents submitted under MCR 2.310 for such information, in answers to interrogatories submitted under MCR 2.309(B), before or during the taking of a deposition during which such information is sought, or by moving for a protective order under MCR 2.302(C). If not timely raised, the privilege is deemed waived for purposes of the pending action, but not for any other action. MCR 2.314(B)(1).

Here, the prosecutor did not request the medical information under MCR 2.310, instead it circumvented that process by seeking and securing the records via a search warrant won as a result of an argument based on the business records exception to hearsay, MRE 803(6).⁵ It appears from the record that defense counsel was likely not even aware that the prosecution had requested and actually received the medical information until the eve of trial. During the October 22, 2009 motion, defense counsel explained as follows:

The People contacted my co-counsel, Ms. Stephens, via phone on the Sunday afternoon directly before the Monday the trial was set to begin and was kind enough to let us know that it had received new information.

⁵ MRE 803(6) sets out the business records exception to the hearsay rule:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

We requested a conference with Your Honor in chambers, time to investigate and look into this new information. That request was granted and the trial was adjourned.

Thus, from the current state of the record it does not appear that defense counsel would have been able to timely respond to a request with any of the options presented in MCR 2.314(C)(1) because the prosecutor had already requested and received the records. Because defense counsel did not have the opportunity to object before the prosecutor requested and received the medical records from St. Joseph Hospital, though not timely raised, we cannot deem the privilege waived for purposes of this action. MCR 2.314(B)(1).

Once defense counsel learned that the prosecutor retrieved the records utilizing the business records exception to hearsay, MRE 803(6), defense counsel responded not by asserting privilege, but instead asserting that the records were not reliable. It appears to us from the record that defense counsel was thrown by the prosecutor's tactical use of MRE 803(6) and responded in kind by raising an argument relative to hearsay, that the contents of the medical records were not reliable. At no time in the trial court did defense counsel raise the privilege statute protecting the confidential nature of the psychologist-patient relationship, MCL 333.18237, or the admissibility of privileged communications governed by MCL 330.1750.⁶ Defense counsel did not raise privilege at the motion on admissibility of the medical records nor during trial when the prosecutor sought to actually admit the medical records into the records at the bench trial. This is perplexing. While we do not have the medical records to review, from the prosecutor's description at trial, the contents of the medical records would be protected under the psychologist-patient privilege. Indeed, the prosecutor does not argue that the medical records are not privileged in its brief on appeal, only that somehow defense counsel's discussion of the medical records at the October 22, 2009 motion hearing "could be viewed as a waiver of the privilege between the psychiatrist and patient." But this argument is not supported by the record. There is no evidence of an affirmative waiver of the privilege when privilege was never mentioned once in the lower court record.

On this record we can fathom no reason for defense counsel not to raise the privilege to avoid the medical records being admitted at trial as evidence. Defendant has thus shown that her trial counsel's performance was "deficient." *Carbin*, 463 Mich at 599-600. But defendant cannot show that the "deficient performance prejudiced the defense." *Id.* "To demonstrate prejudice, the defendant must show the existence of a reasonable probability that, but for

⁶ In fact, while not raised on appeal we find it necessary to point out that defense counsel also ignored defendant's protections under the Health Insurance Portability and Accountability Act (HIPAA). "Under HIPAA, the general rule pertaining to the disclosure of protected health information is that a covered entity may not use or disclose protected health information without a written authorization from the individual as described in 45 CFR 164.508, or, alternatively, the opportunity for the individual to agree or object as described in 45 CFR 164.510." *Holman v Rasak*, 486 Mich 429, 438-439; 785 NW2d 98 (2010).

counsel's error, the result of the proceeding would have been different.” *Id.* at 600. Defendant cannot make this showing.

Defendant was not charged with a drug offense, she was charged only with larceny in a building. The elements of larceny in a building are: (1) an actual or constructive taking of goods or property; (2) a carrying away or asportation; (3) the carrying away must be with a felonious intent; (4) the goods or property must be the personal property of another; (5) the taking must be without the consent and against the will of the owner; and, (6) the taking must occur within the confines of the building. *People v Sykes*, 229 Mich App 254, 278; 582 NW2d 197 (1998). Based on the record, there was eyewitness testimony that defendant was not Lucretia's care nurse, defendant was not responding to an alarm on Lucretia's IV machine, defendant withdrew fluid from Lucretia's IV port at least three times with a syringe, put the fluid-filled syringe in her pocket, said nothing, and then immediately left the room. Lucretia's mother, father, and aunt all witnessed defendant engage in this behavior several times throughout the day Lucretia died. This eyewitness testimony is sufficient to support the elements of larceny in a building. We agree with the trial court's observation that on this record defendant would have been guilty of larceny in a building if the “goods or property” she carried away was saline from Lucretia's port rather than morphine. In sum, despite defense counsel's deficient performance, because defendant cannot show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, she has not established prejudice. *Carbin*, 463 Mich at 599-600. Defendant has not shown error.

B

With regard to defendant's contention that her trial counsel was ineffective for failing to move to suppress the psychological records because the prosecutor seized them pursuant to an invalid search warrant, we also find no prejudice affecting the outcome of the proceeding. We have concluded that the medical records at issue were privileged and not discoverable, and therefore we also conclude that defense counsel was deficient when they failed to even raise the argument that the search warrant may have been invalid under MCL 780.652 (property and persons subject to search and seizure) as to the privileged medical and psychological records. However, we need not delve deeply into the merits of the validity of the search warrant because of the overwhelming eyewitness evidence establishing the elements of the crime of larceny in a building. Even if we assume that the evidence was seized pursuant to an invalid search warrant, the evidence was not essential to the elements of the crime. As such, defendant cannot show prejudice on this record. Again, despite defense counsel's deficient performance, because defendant cannot show the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different, she has not established prejudice. *Carbin*, 463 Mich at 599-600.

C

Defendant finally asserts that her counsel was ineffective because they failed to object to the introduction of other acts evidence where the evidence was inadmissible pursuant to MRE 403 and MRE 404(b). We review for an abuse of discretion the admission of other acts evidence at trial. *People v Johnigan*, 265 Mich App 463, 465; 696 NW2d 724 (2005). An abuse of

discretion occurs when the trial court's decision falls outside the range of reasonable and principled outcomes. *People v Young*, 276 Mich App 446, 448; 740 NW2d 347 (2007).

Michigan Rules of Evidence prohibit “evidence of other crimes, wrongs, or acts” to prove a defendant’s character or propensity to commit the charged crime, but permits such evidence for other purposes, “such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act” MRE 404(b)(1); see also *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). Other acts evidence is admissible if it is: (1) offered for a proper purpose, that is, one other than to prove the defendant’s character or propensity to commit the crime; (2) relevant to an issue or fact of consequence at trial; and (3) sufficiently probative to outweigh the danger of unfair prejudice, pursuant to MRE 403. *People v Starr*, 457 Mich 490, 496-497; 577 NW2d 673 (1998); *People v VanderVliet*, 444 Mich 52, 55, 63-64, 74-75; 508 NW2d 114, amended 445 Mich 1205 (1994). Evidence is relevant if it has any tendency to make the existence of a fact that is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *People v Yost*, 278 Mich App 341, 355; 749 NW2d 753 (2008). When the prosecution intends to introduce other acts evidence, the prosecution is required to provide notice before trial, or during trial if the court dismisses the pre-trial requirement for good cause. MRE 404(b)(2).

Defendant complains about three instances of alleged intoxication described during Title’s testimony: (1) that defendant passed out and was taken to the ER in November 2007, (2) defendant seemed intoxicated when she was found sitting in a chair in a patient’s room and had to be taken to the ER in May 2008, and (3) defendant seemed intoxicated at the disciplinary review meeting in September 2008. Defendant asserts that testimony regarding any of these three incidents was not admissible for a proper purpose under MRE 404(b), but rather was introduced only to show her bad moral character. Defendant contends that because her defense was that no morphine was missing and that she never took any morphine from Lucretia’s IV port but rather properly took air out of the lines, the evidence was not relevant to show her “intent, preparation, scheme, plan, or system,” as permitted under MRE 404(b)(1). But to the contrary, the evidence as testified to by Title was logically relevant to a disputed issue at trial and it was not used solely to show the criminal propensity of defendant and her conformance therewith. The evidence was used to demonstrate defendant’s “motive” for taking morphine out of a patient’s line. The evidence was not used to show that defendant had a propensity for taking the property of others, i.e committing larceny. The evidence was offered for a proper purpose and was relevant to an issue or fact of consequence at trial.

Defendant also argues that the prejudicial effect of the evidence substantially outweighed its probative value. “Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.” *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). “The danger the rule seeks to avoid is that of unfair prejudice, not prejudice that stems only from the abhorrent nature of the crime itself.” *People v Starr*, 457 Mich 490, 500; 577 NW2d 673 (1998). Again, the probative value of the other acts evidence was relevant to rebut defendant’s theory that no morphine was missing. Defendant’s theory of the case was that nothing was missing from Lucretia’s morphine IV bags, and the prosecutor’s theory of the case was that morphine was in fact missing, and that defendant took it because she was motivated by a drug problem. Thus, the evidence was not merely marginally probative, but was highly probative of the ultimate issue, i.e., whether defendant committed the

offenses charged. The prejudicial effect of the evidence did not substantially outweigh its probative value.

Defendant also assigns error to the fact that the prosecutor did not provide the requisite notice that it intended to offer other acts evidence through Title's testimony at trial. Indeed, when the prosecution intends to introduce other acts evidence, the prosecution is required to provide notice before trial, or during trial if the court dismisses the pre-trial requirement for good cause. MRE 404(b)(2). The prosecutor has violated MRE 404(b)(2) and committed plain error because it did not provide the proper notice. However, "the harmless error standard requires us to consider the effect plain error has on a proceeding. Because [defendant] has never suggested how [she] would have reacted differently to this evidence had the prosecutor given notice, [this Court] has no way to conclude that [the] lack of notice had any effect whatsoever." *People v Hawkins*, 245 Mich App 439, 455; 628 NW2d 105 (2001). Defendant has provided no indication in her brief on appeal that notice of the substance of Title's testimony regarding these three events would have had any effect on whether the trial court would have admitted the evidence at trial. Also, defendant failed to indicate what she would have done differently had she received notice. Thus, she has not established that the lack of notice prejudiced her at trial.

Defendant has not shown that her counsel was ineffective in failing to object to the other acts testimony because the evidence was admissible pursuant to MRE 404(b) and not prohibited by MRE 403. In light of the fact that other acts evidence was admissible, trial counsel cannot be deemed ineffective because attorneys are not required to raise futile objections. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). And the lack of notice was nothing more than a harmless error on this record.

IV

In sum, defendant has established that she indeed received the ineffectiveness of counsel at certain points during trial related to the admission of her medical records into evidence. But considering the overwhelming eyewitness evidence that defendant committed the crime of larceny in a building at least three times as Lucretia was passing away with her family around her, defendant has not overcome the heavy burden of demonstrating the existence of a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. On this record, defendant has simply not established prejudice or reversible error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Stephen L. Borrello
/s/ Jane M. Beckering